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ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT. MAY TERM, 1813.

East. District *May* 1813.

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THE SYNDICS OF BROOKS, APPELLANTS,

vs.

W. & J. WEYMAN, APPELLEES.

SYNDICS OF BROOKS *vs.* WEYMAN

Refusal of a new trial no ground of appeal.

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the new trial refused. The Court are of opinion, that the refusal to grant the new trial is no cause of appeal: that according to uniform practice, the judgment should be entered *nunc pro tunc*— that this Court having already decided, *Bermudez* vs. *Ibanez*, *ante*, 1. that no appeal lay from the Superior to the Supreme Court, the present appeal must be dismissed.

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FORTIER vs. DECLOUET.

FORTIER vs. *DECLOUET.*

By the Court. The defendant was arrested and held to bail by the sheriff. An application was made to the Judge of the first judicial District to discharge him; the Judge refused. An appeal, or something in the nature of it, from the refusal of the District Judge, is prayed for to this Court.—The Court are of opinion that this is not such a case as will support an appeal. The motion is therefore overruled.

No appeal lies from a motion to discharge bail.

SYNDICS OF BERMUDEZ vs. *IBANEZ & MILNE.*

BERMUDEZ, in January 1812, brought his action, in the Superior Court of the late Territory of Orleans, to compel Ibanez to convey to him, a lot of ground sold to him by Bermudez's agent. The following interlocutory decree was made: the Court is of opinion that the land mentioned in the petition was directed to be sold, by the plain-

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Trustee privileged on trust estate.

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tiff, without any fraudulent intention—that from the relation in which the defendant stood to the plaintiff and his wife (being her brother) by whose agency the sale was effected—from his avowed object in pressing the plaintiff to authorise his wife to sell—from the price given, and the subsequent declarations of the defendant, since the plaintiff's return, it appears that the purchase was made with a view to secure the defendant's claim, and it was the intention of the defendant, in the knowledge of the plaintiff's agent, at the time the sale was made, that on the defendant's being fully paid all his advances, he should sell the land for the benefit of the plaintiff or his family or reconvey it.—It is therefore ordered &c. that the defendant do file with the clerk a statement of his claim for all monies by him paid or advanced for the plaintiff, or his family—that the same be referred to three persons to be agreed upon by the parties, or named by the Court, and that on the plaintiff paying the sum reported to be due by him to the defendant, within sixty days, the defendant do reconvey the premises to him, and on failure of payment within sixty days, that the premises be sold to satisfy the defendant's claim and the balance be paid to the plaintiff.

THE referees, reported a balance in favor of Ibanez of six thousand and odd dollars, and Bermudez neglecting to pay, an execution was levied on the lot and it was for the third and last time

advertised for sale, on the 3d of February 1813, at one year's credit.

Before this day, Bermudez presented his petition to the Superior Court stating his insolvency and annexed to it a schedule of his property, in which the lot was set down, as part of it. The Court declined granting any stay of proceedings, as the shedule presented no property on which the stay could operate, except the lot, which had been ordered to be sold. On this, Bermudez presented a similar petition to the City Court, from which he obtained a stay of proceedings and an order for the meeting of his creditors.

At a meeting of the creditors, syndics were appointed and Bermudez made to them a *cessio bonorum*. The proceedings were homologated and an order of the City Court obtained enjoining the sheriff from proceeding to the sale of the lot.

The syndics on the same day, January 30th 1813, brought suit against the sheriff and Ibanez, to recover possession of the lot. Process was served on the first of February, and the sheriff proceeded to the sale, on the day appointed, and Bermudez's brother, being the highest bidder, having bid $ 7000, the sheriff required of him to enter into bond with surety, according to law. He named a solvent person then absent, and the sheriff insisting on the surety being produced, the purchaser went in quest of one, but returned without any, and on the following day the lot was

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again put up and struck to Milne, for $ 7000, but no bill of sale was made out, in consequence of an opposition made by the syndics, who obtained an injunction from the City Court on the 9th of February.

ON the 5th of April the syndics filed a supplementary petition in the District Court, to which the record of the original suit was (after the change of government) removed, making Milne a party thereto, stating the sale and praying a rescission of it.

AT the trial it was proved that Bermudez's brother, the first purchaser of the lot, was worth upwards of seven thousand dollars and that the person he had offered as his surety was worth much more and would have been ready to sign the bond, had he been found. The District Court gave judgment for Ibanez and Milne, the defendants, and the syndics, the plaintiffs appealed.

Smith and *Ellery* for the appellees. This case presents itself under two principal points of view.

1. WHAT was the situation of the original parties, prior to the insolvency?

2. WHETHER any, and what change of relation was produced between the parties, by the subsequent act of Bermudez, convoking his creditors and the proceedings that then ensued so as to affect the rights of Ibanez, as settled by the judgment?

I. It appears by the judgment in the original suit, that, prior to its institution, Ibanez had an absolute conveyance of the property in question—that the purchase was made to secure the repayment of his advances—that he relied on it as his security and that he intended to reconvey, only on being fully paid—that he was in possession and had every apparent feature and quality of owner. Could Bermudez have then obtained possession without first refunding what was due? If he had then proclaimed himself insolvent, what could his syndics have done, more than to call upon the equitable jurisdiction of the Court below and address themselves to the conscience of the defendant, in order to establish the true state of the property; and thus arrive in time, just at the point at which Bermudez himself had arrived in obtaining judgment against Ibanez? They are not now at liberty to say they would have obtained a better judgment, it is the very foundation of their title, and is not to be gainsayed by them.

But the effort has been already made by Bermudez before insolvency, and he has succeeded against the pretentions of Ibanez to the utmost that can be done by him or by any who represent him. He has obtained a final decree of account, in the last resort, making a specific disposition of that property which was before under the absolute control of Ibanez. And what is

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that specific disposition? Why, that Bermudez shall by entitled to have a reconveyance of the property provided he refunds within sixty days to the defendant the amount of his advances: otherwise that the property shall be sold by the sheriff and Bermudez receive the proceeds, after a deduction of the advances.

THIS is a judgment recovered by the insolvent, before insolvency, and against the defendant, Ibanez, limiting his former control over the property. Were not Bermudez and Ibanez, the original parties, indissolubly bound by it?

II. IT is an established principle of law that the creditors of an insolvent take his estate, subject to all the equities, which governed it in his hands, and also that all acts fairly made by the insolvent stand as well against his creditors as against himself. 1 *Cook's* B. L. 325. 1 *Vesey* 331. *Rowe vs. Dawson*, 2 *Vernon* 286 *Pope vs. Onslow*, 2 *Vesey*, 633, *Hinton vs. Hinton*. By the judgment in the suit between the original parties it appears that the plaintiff had conveyed the title and delivered the possession of the estate to the defendant, as a security for advances made and to be made by him. It appears also that the act had been *fairly done* and further that it was clearly the *intention of the parties* that the title should *not* be *reconveyed* and that possession should *not* be *redelivered* until Bermudez the

vendor should refund the amount of these advances, whatever they might be. Would not such an act then, upon the authorities that have been cited, stand against the creditors independently of the judgment: being an act fairly done, and on the faith of which the defendant advanced his money, and more especially as sustaining it could not operate any fraud or inconvenience to the creditors in general? For the title and the possession having been both long in the defendant, it could have obtained for the plaintiff no delusive credit. His others creditors could not have trusted to property that seemed to belong to another. The real question then, in the present case seems to be whether Bermudez, the plaintiff, in the original suit, can by declaring himself insolvent *defeat a judgment* from which there was no appeal. This is the naked meaning of the case.

THE judgment is that the estate be reconveyed to the plaintiff, provided he first refund to the defendant the amount of his advances. Otherwise that the estate be sold by the sheriff, and the balance only of the proceeds be delivered to him, after payment of the defendant's advances. The object of the present suit is to obtain a reconveyance, *without* first refunding the advances in question—to annul the sale of the sheriff *without* being obliged to receive the mere balance of the proceeds of the sale, equally in contravention of

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the clear understanding of the original parties and of a final, irreversible judgment, enforcing the specific performance of the contract.

THE decree in question is not like an ordinary judgment, establishing a debt, a mere judicial mortgage against the insolvent's estate : *such* a judgment would be unaffected by a delivery of all the property, possessed or claimed by the insolvent, into the hands of the syndics, and might be equally well satisfied at the hands of the syndics and at the hands of the sheriff. But this decree, which is admitted to be a final judgment, of no less authority, than a judgment homologating the proceedings of creditors, cannot be complied with consistently with the success of the plaintiffs' demand, but must, in such event, be infringed. If this decree had been simply that the defendant reconvey to the plaintiff, provided he first refund to the defendant the sums he had advanced on the faith of that security, it would seem to be undeniable that the subsequent insolvency of the plaintiff could entitle his syndics to a reconveyance on no better terms—but the latter part of the judgment was intended to enforce a compliance with the first. Shall then the judgment be said to be unshaken, when the means which it prescribes for its own enforcement can be legally resisted ?

Turner, for the appellants. In examining the plaintiffs' claim three questions necessarily arise.

1. HAD Bermudez any right or interest in the lands, at the time of his insolvency and surrender of goods?

2. Do the proceedings on his petition in the City Court suspend the proceedings on the order of sale of the District Court?

3. INDEPENDENTLY of those proceedings, is the sale to Milne a valid one, under the act of assembly?

I. IT is contended by the defendant, that Bermudez had no right to the lands, and could acquire none, but by payment of the money decreed to the defendant, within the time limited by the decree, and that not having done so, the estate became absolute in the defendant, before the insolvent exhibited his petition and schedule; and that therefore he ought not to have inserted the land in the schedule, and that the plaintiffs therefore can have no right to it.

THESE positions are not warranted either by the law, nor the decree, of the late Superior Court.

WE do not pretend to claim title under the decree; we contend that by the decree, it is established that Ibanez never had any other than a trust estate in the premises; he is a mere trustee for our use. But having made advances to Bermudez, he has a lien on the lands for the amount of his debt.

BY the Roman civil law, the *cestuique trust* is

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considered as *the real owner of the lands.* And the Courts of equity have ever gone upon the same principle; and have always compelled the trustee to perform the trust, whether the trust was declared in the deed or not. 2 *Fonblanque*, 1, 8, 121 *Sanders' essay* 1, 6, 11.

It is even a maxim of the civil law "that he who has the right of action for a thing, is considered the owner of the thing."

This is also the rule of common sense and of common practice. It never was heard of that a man might come into Court, with a suit, to acquire a right, to a thing which he was not before the owner of.

If indeed a suit should be so commenced, and it should turn out, on the trial that the plaintiff had no right, he must be cast as a matter of course. And yet the defendant contends we had no right to the land, but such as was acquired by the decree, that our right then for the first time had its origin—a doctrine strange in jurisprudence, and contradicted by the decree itself.

It is too manifest to admit of argument to the contrary that the land belonged to Bermudez, but was subject to the incumbrance of Ibanez's debt, as a mere mortgage or pledge.

Had it been otherwise, the Court could never consistently with either the rules of law or equity have decreed the defendant to reconvey the title to Bermudez, on the payment of his debt.

If we consider the land in the possession of the defendant as under mortgage for Bermudez's debt, the rights of Bermudez are just the same, as in the case of a trust estate.

The mortgagor is considered as the real owner, and the mortgaged thing as a mere security for the debt, and the mortgagee as a trustee for the mortgagor. 2 *Fonblanque* 261. *Powell on mortg.* 15 76.

It is clear therefore that Bermudez had a property in the lands; but it is not material to the present inquiry, what that interest is worth, nor in what manner it existed: it is sufficient that he had an interest: that interest whatever it was, vested in the plaintiffs as syndics.

II. The 2d. question is very easily disposed of.

Having, as I believe, shown beyond the possibility of a legal doubt, that the property in the lands in controversy was vested in Bermudez, not by any appointment of the decree, but by his old and original title, acquired long before Ibanez had any claim upon it:

I will now attempt to shew that the order of sale of the late Superior Court was suspended by the surrender of the insolvent's property.

It is declared in 4 *Febrero*, book 25—a consequence of such proceedings by an insolvent, that all judicial process against the insolvent, or against his property, are suspended.

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THIS was the existing law of the land before the compiling of our Civil Code—It was so acted on; it was the uniform practice of the country; and it has been recognized and solemnly decided, to be the law of the land in the case of *Elmes* vs. *Estevan* in the Superior Court. 1 *Martin*, 193.

BY the Civil Code 294 art. 172, it is provided that the surrender of property, "suspends all kinds of judicial process against the debtor."

THESE words are very general, and comprehend every thing denominated process.

PROCESS, by the strict and technical rules of the common law is divided in to original process, mesne process, and final or judicial process.—Thus we find that the words of this law emphatically apply to executions, as judicial process;—But the words need no aid of illustration, they are plain and comprehensive, and take in all kinds of process, issuing from a Court, whether original, mesne, or final process, and whether against the person of the debtor or against his property, generally or specially.

IT is also provided in the Civil Code 440, art. 6, that mortgage creditors are affected by the respite, in the like manner as the other creditors.

BUT the defendant again contends, that the order of sale, and proceedings of the sheriff to advertise and sell the land, are not judicial proceedings against the insolvent. Because, say

the counsel, it is a proceeding to enforce a decree made in a suit of *Bermudez* vs. *Ibanez*, by which he, as plaintiff, was to be benefited: that it is not a proceeding against the insolvent nor against his estate, but on his behalf and against the lands of Ibanez.

This objection is not even plausible—the proceedings in the suit shew that it was instituted to obtain a conveyance of the trust estate to the plaintiff—and that the suit was opposed by defendant upon the ground of his being a purchaser for a valuable consideration, and holding the land by complete title, made several years before. But the Court decreed in favour of the plaintiff—that it was only a trust estate, and must be reconveyed by the defendant. But as it appeared the defendant had made advances, which were to be considered as an incumbrance on the land, the Court treated the subject as a mortgage and ordered the plaintiff to pay the defendant's debt before the reconveyance of the lands, and in default of such payment by a given day, the land should be sold by the sheriff.—How sold? Why as the property of the debtor, most undoubtedly, and to satisfy his debt.—Moreover the excess of proceeds, after paying the defendant his debt, are ordered to be paid to the plaintiff. Why sell the land to satisfy the defendant's debt, and why pay the excess of proceeds to the plaintiff, if it was not his land? The decree is double—it looks

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two ways—it requires duties to be performed by both plaintiff and defendant—it calls on the defendant to reconvey to the plaintiff—it also calls on the plaintiff to discharge the defendant's claim on it. As it regards the debt, it is a judgment against the debtor and the process is against him as in other cases of judgment on mortgage. It is therefore *quoad* the order of sale a judicial proceeding against the insolvent. It can be no other in law or reason.

III. THE surrender of the insolvent's property (and this very land amongst the rest) being made before the sheriff had carried into effect the order of sale, all further proceedings thereon were suspended by the rule of the City Court—nay the convocation of creditors was had, their proceedings before the notary homologated and notified to the sheriff before the sale. The sale therefore to Milne was contrary to law and ought to have been set aside by the District Court.

THE sale to Milne is irregular on another account. But as the plaintiffs' right appears so manifestly against the decree on the first point, it seems almost unnecessary to notice any other objections, in the cause. But as the property is of great value, if the sale to Milne, be confirmed, it will greatly injure the creditors, the Court will please to pardon me if I should trespass a little further on their time and patience.

By the execution law the sheriff is required to sell at twelve months credit on "mortgage and security."

Acts of 1808 page 48.

This law has two objects in view, viz, 1st to obtain the greatest price possible, and 2ly the security of the purchase money. The first and greatest, is the price—it is therefore important to extend the sphere of bidders to the greatest limit—the sale is to be by public auction—to be in the day time—and upon twelve months credit—this object so desirable for the benefit of both debtor and creditor, would in a great measure be defeated, by requiring the kind of security demanded by the sheriff in this instance. He requires *an endorsed note*—a thing unknown to the law, and justified only by the usage of merchants—an endorsed note is consequently a negociable note—it may be paid away in a course of trade and dealings—it may be deposited in the bank for collection—it may be discounted at bank—it then will be subject to all the rules and burthens of mercantile usage—it may be protested for non payment—the endorser will be immediately responsible—not as security, but as principal—he cannot claim the sale of the thing mortgaged—he cannot claim a discussion of the principal's effects. Many men therefore would not endorse who would join in a bond or note as security—many bidders might be able to give security, who

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could not get an endorser—But this mortgage and security is *ex natura* an authentic act—made before a notary, or at least acknowledged before one—it is not to be given nor required by the sheriff, until he is ready to make a deed for the land sold; as he is required by the law to do—he could not require the security at the instant of the sale—he ought to appoint a time and place where the mortgage and security is to be given, and notify the purchaser of it—he has no right to require the mortgage and security until he is ready to make the conveyance—the law gives him one week to do this—*Laws* 1805, 180 246. If this course is observed by the sheriff, and I contend it is the only legal one—the bidder will have time to get his security—he will have time to go among his friends and find out such as are able and willing—if he should be disappointed in one, he may find another—but very few indeed, could do this on the ground, the instant the property is struck off to him, or even in the short space of half an hour.—The bidders therefore would be very limited, and none but rich speculators could come into the market—thus the wholesome provisions of the law would be defeated—the security, when given in the manner I contend for, could not be called on for payment until after the mortgaged thing was sold, and if it fell short of the debt; nor until the principal's effects are discussed and found also deficient.—By the statement of

the sheriff contained in the record, J. B. Bermudez was adjudged the highest bidder—and as he required of him terms, which by the law he could not do; and as he again sold the property on the same day and upon terms unjustifiable, the sale is irregular and the District Court ought to have quashed it.

I trust therefore that, upon both these grounds, or one of them, the Court will think with me, that the decree, appealed form, ought to be reversed.

Ellery and *Smith*, in reply. The sale of the sheriff, under the judgment, is not a proceeding against the person or property of the insolvent. It is a sale under a judgment, in which the insolvent was plaintiff, and notwithstanding the condition, incorporated in it in favor of the defendant, it is no less a judgment in favor of the plaintiff—a judgment by which the previous absolute title of the defendant was converted into a privileged security only: and by which the plaintiff acquired a right to a reconveyance of the title on the fulfilment of a certain and definite condition, or, at all events, to the balance of the proceeds of the sale.

Without the benefit of that judgment, where would be the pretentions, of the insolvent or his syndics, against the apparent, absolute title and

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the possession of the defendant, Ibanez? It is then a judgment in favor of the plaintiff, Bermudez, awarding him what he could not obtain without it, and therefore the execution of it is a proceeding *against* neither his person nor his property. The security of the defendant has been likened, in the course of the argument, by the counsel of the appellants, to a *mortgage*; but of a mortgaged property, both the title and possession remain, in the mortgagor, and, of course, on his insolvency pass to his creditors at large. The syndics would not be obliged to recur to a suit, in order to realize the estate, to convert it into money for the discharge of the debts. On the other hand, the mortgage creditor, having contented himself with a security, by which the title and possession of the property on which it was imposed, remained in the debtor, *prior to* his insolvency, could insist on nothing better, against the syndics, *after* that event. The security, in the present case, has no more resemblance to a mortgage, than the general one of being a security for a debt, and raised on real property.

It has been likened in the next place to a *trust*. But, a trust estate, according to the English law; is created for the sole benefit of the *cestuy que trust*. The feoffee in trust, or trustee, holds it subject to the controul of the *cestuy que trust*, and is bound to reconvey at his pleasure. But, even in the case of a trust estate, the trustee, if

he have made advances, on the credit of the estate, or have since, *in any other way become a creditor* of the *cestuy que trust* shall hold possession of the premisses; not only against him, but also against his creditors, in case of his insolvency, until the full payment of whatever may be so due. *Lessee of Trazes & al.* vs. *Hallowell*, 1 *Binney* 126.

It will not be contended that a pawnee can be compelled by the creditors of a bankrupt to surrender the pawn, without being first paid the money he has advanced upon it. But, in the present case, the defendant has, equally with the pawnee, *possession* of his security; and further that security is a realty, and is assured to him, by the solemnity of an absolute title.

It is, however, not true, that the possession of all property whatsoever to which a party may have title, or in which he may have an interest, passes, on his insolvency to his creditors at large: and it may be laid down as a general rule that the possession of property, in which an insolvent, at the time of his insolvency, *had not the right of possession*, shall be recovered by his creditors, in no better terms that these which would have availed the insolvent himself.

With regard to the second ground, assumed by the counsel of the appellants, *viz.* that the sale of the sheriff is irregular, in as much as the

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property was struck off to one bidder, when another was the real purchaser, it seems to be somewhat foreign to the cause.

To the parties in this suit, it would seem to be a question wholly immaterial whether the sheriff give a deed to one or the other of the bidders, provided he take care, in due time to produce the best price offered for the property, at the sale. If, however the sheriff had committed some irregularity, clearly vitiating the sale, the consequence that would follow must be, that he should sell again. If he had committed some error of form that might bring in question the title of the purchaser that could lie between that purchaser and the sheriff or some rival bidder. The sheriff's bill of sale must bind the property against all the world, except a rival bidder or a party claiming under another title.

By the Court. In this case, the respective rights of the original parties (Bermudez and Ibanez) to the lot of ground in dispute, have been settled by the decree of a Court from whose decisions there is no appeal.

The determination of the present suit depends, therefore, on ascertaining which of the said parties was recognized by that decree, as the owner of the contested land.

It appears that while F. X. Bermudez, once the undisputed proprietor of the lot in question,

was absent from this country, F. Ibanes, the brother of his wife, urged him to authorize her to sell that property; that Bermudez having sent the necessary authorization, Ibanez became the purchaser of the lot, apparently for a fixed price, but in reality for the purpose of securing an unliquidated claim of money which he had against Bermudez; that at the time of sale, it was understood between the contracting parties, that, when Ibanez should be reimbursed his advances, he would either re-convey the land to Bermudez, or sell it for the benefit of Bermudez and his family. It does further appear from the said decree, that the claim of money of Ibanez had remained unsettled, and was to be subsequently ascertained; finally, that on Bermudez paying, within a certain delay, the sum thus to be liquidated, the land was to be re-conveyed to him; otherwise to be sold for the payment of that sum, and the balance to go to Bermudez.

Posterior to that decree, the claim of Ibanez was settled by the referees to the sum of six thousand, six hundred and six dollars and seventy five cents; and on Bermudez' having failed to pay it within the fixed time, the sale of the land was decreed to be made by the sheriff. Previous, however, to the sale, Bermudez called a meeting of his creditors, and an order issued from a competent Court, staying all proceedings against him, notwithstanding which order, the sale was

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executed. The present plaintiffs have prayed for a rescission of that sale, and from a decree of the Court of the first district, refusing to rescind it, they have claimed the appeal on which this Court have now to pronounce.

THE situation of the parties in this case is, indeed, a novel one. But however ambiguous their rights may appear at first, one point, at least, is very clear—and that is the non-existence of any real title in Ibanez. His right to the land was not even that which is acquired by purchase subject to redemption; for, in such case, the purchaser may become the absolute owner, in the event of the vendor's suffering the stipulated delay to elapse without redeeming, while here in defect of payment the property was to be sold. A property, which was to be sold to pay Ibanez' claim, surely could not be considered as his property: the idea is repugnant to common sense. A right to be paid out of the proceeds of a sale, far from bearing any resemblance to a right of property in the creditor, implies the very reverse; for it is a right to be exercised against the property of another.

IT being ascertained that Ibanez was not the owner of the land in dispute, it remains to enquire what kind of right he had on that land. His right was not that of a mortgagee, nor that of a purchaser under a claim of redemption; nor can it

strictly be called an *antichresis*. The object of the contract was to vest him with as ample a security as could be given. The nature, also, of the debt, part of which must have been created by advances made for the support of Bermudez' family, during his absence, entitles his claim still more to be recognized as a privileged one. And when the Court further consider that in cases of *antichresis*, to which this may in some degree be assimilated, the debtor cannot before full payment of the debt, claim the enjoyment of the immovable estate which he has given in pledge (Civil Code book 3d, tit. 18, art. 24) they feel disposed to secure to the defendant, Ibanez, the immediate payment of his debt, independent of any agreement of the other creditors of Bermudez.

Upon the whole, the Court are of opinion that Bermudez was, at the time of his failure, the true owner of the lot of land in contest; that the decree ordering a stay of proceedings against him, ought to have stopped the judicial sale of that land, and that the sale made in contravention to it was illegal and void. It is therefore ordered, that the said lot be surrendered to the syndics of the creditors of Bermudez, for the purpose of selling it within the usual delay of judicial sales, payable, to wit, the sum of six thousand, six hundred and six dollars and seventy five cents in cash, to satisfy the claim of Ibanez, and the remainder at such

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credit as they may think proper to fix agreeably to the directions by them received from their constituents; unless the said syndics choose to satisfy the said sum to Ibanez. And it is further ordered that the parties shall pay their respective costs.

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If there be a supplemental petition, & the judgment be on the original one, the suit will be remanded.

By the Court. The first petition stated that the plaintiff was endorser of the notes in question—that afterwards he transferred them to Jones, who had brought suit for the recovery of the amount—that the defendants were jointly liable, and prayed that they should be decreed to pay *in solido* the amount of the judgment to be recovered against him. The defendants pleaded that they were not liable, until the plaintiff should have paid the amount of the notes. Afterwards, on the 17th of March, on motion of plaintiff's counsel, it was ordered by the Court, that he have leave to amend the pleadings by filing a supplemental petition, which was done; and the petition set forth that the plaintiff had paid the notes, and therefore prayed that the defendants might be condemned in principal, interest, and costs. The defendants answered, that at the time of bringing the action, the plaintiff was not the holder, and therefore the suit could not be maintained. On the 14th of April, it was decreed that the plaintiff had no property in the notes, and consequently no right of action.

THE Court are of opinion that the Judge below should either have refused the supplemental petition, and then have decided on the right to recover in guaranty; or having received it, to have determined the merits of the case on the original and supplemental petitions and answers: this has not been done. The *fact* on which the case was decided, was not as is stated in the judgment, nor did the defendants pretend that it was so. It was alledged in the supplemental petition, that Lanusse had paid Jones, and was then the actual holder; the defendants did not deny that, at the period of filing the supplemental petition, Lanusse was the holder; but answered that he was not the holder, at the time of commencing the suit. The Court, however, decreed that he had no property in the notes, and consequently could not support the action. We must believe that the Judge below did not act upon the supplemental petition and answer; and thinking, as the Court does, that in this he erred, it is ordered and decreed that the judgment below be reversed, and that the case be remanded to the District Court, with instructions to proceed to trial on the original and supplemental petitions and answers as one case.

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No appeal lies on proceedings on an *Habeas Corpus*.

LAVERTY vs. *DUPLESSIS.*

DUPLESSIS, Marshal of the United States for the Louisiana District, being ordered to remove aliens enemies, to a certain distance, in the inland parts of the State, arrested *Laverty*, a native of Ireland, (the United States being at war, with the king of the United kingdoms of Great-Britain and Ireland) who claimed the citizenship of the United States, under the decision of the late Superior Court of the Territory of Orleans, in *Desbois'* case, 2 *Martin* 185, and was accordingly discharged on a writ of *habeas corpus*, issued by the District Court of the first District. *Duplessis*, thought it his duty not to submit, without the determination of the Supreme Court, and prayed an appeal. The District Court refusing it, he moved for a *mandamus*, to the District Court to allow the appeal and send up the record.

THE case was argued by *Grymes*, attorney of the United States, and the most eminent counsel at the bar, during several days.

By the Court. This case, as it has been argued by desire of the Court, presents two questions for its consideration.

1. WHETHER any, and what criminal appellate jurisdiction is given? and

2. WHETHER under the constitution or laws,

this tribunal can exercise a general superintending jurisdiction over Inferior Courts?

I. WITH respect to the first point, it is contended by some, that as the *whole* judicial power is vested in the Supreme and Inferior Courts, and the *appellate* jurisdiction is confided here, it necessarily follows that criminal appellate jurisdiction must be exercised by us.

LET us first examine the words of the constitution. It is declared that "the judicial power shall be vested in one Supreme, and Inferior Courts. The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the value of three hundred dollars."

IT has been said, in the course of the argument, that this State being, as to internal regulations, completely sovereign, she had a right to distribute the powers of government at her will—that a declaration in the constitution that the appellate power shall extend to *civil* cases, is no restriction on the Court to exercise it in *criminal*, and that nothing can be inferred from legislative silence; that even had the Legislature attempted to prohibit its exercise, it would have been an unconstitutional act, and consequently void.

BEFORE we proceed further, it is important to ascertain, whether appellate jurisdiction be at all

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essential to the exercise of judicial power—whether it is absolutely necessary in criminal cases—and a sovereign State may not refuse it altogether, or establish it in some cases and deny it in others.

THESE questions may be answered by a resort to general principles, and by a reference to the practice of other countries—of our own and of our sister States.

THAT a sovereign State has a right to establish such a judicial system as it pleases, is a proposition that must be assented to by all. The sole restraint that we can imagine is, that in the distribution of its powers it shall not violate any of the great principles secured by the national compact; but the only imperious duty of the State, in this department, is to establish tribunals for the decision of disputes amongst individuals, and for the trial of offences against the social order. But whether this shall be done in one Court or in many, whether the first decision shall be final, whether there shall exist one appeal or more, or in what cases it may be granted, is not to be regulated by those whom the people may call to the important duty of framing a constitution.

THAT this was perfectly understood by the convention of this State, appears by restraining appeals in civil cases to sums above the value of three hundred dollars. That the erection of Courts of appeal has not been deemed important to the protection of life or liberty, is easily proved from

the practice of our own territory for nine years past, from the organization of the federal Courts of the United States, and of other states, particularly Kentucky.

The words of the constitution of the United States, conferred on Congress as full power to establish appellate jurisdiction in criminal cases, as could possibly be granted. "The judicial power shall extend to *all cases in law or equity* arising under this constitution, the laws of the United States, or treaties made, or which shall be made under their authority—the Supreme Court shall possess appellate jurisdiction both as to law and fact, (except in cases of ambassadors and consuls) under such regulations as Congress shall prescribe." Laws were immediately passed defining offences and organizing the Courts. Have Congress passed any laws on the subject of criminal appellate jurisdiction? Have not their Courts, over and over again, refused to exercise it, because it was not given by Congress? Have not those Courts been in operation twenty years or more, and have not cases occurred which might remind Congress to establish such a jurisdiction, if they really thought it necessary? Have not two insurrections been suppressed, and many offenders tried for capital offences? We cannot have forgotten the case of Fries and of so many others, where it was said that the doctrine of treason was carried to its utmost extent, by a time-

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serving Judge, to promote his own ambitious views; and that this able and much calumniated magistrate was impeached, and acquitted by the good sense of the Senate? Do we not recollect the more recent case of Burr, where it was openly declared that the great and upright magistrate, who presides with so much usefulness and dignity on the Supreme bench of the United States, relaxed the law of treason to favor the escape of a powerful criminal? Have these cases passed unnoticed? No—they have not. The late President of the United States caused a special message to be sent to Congress, enclosing the testimony in the case of Burr, and called their attention to the defects of the law, or the administration of it. Yet after this solemn call, and after much deliberation, Congress have not discovered the want of a criminal appeal to be a defect in the system; and altho' their Courts have refused to exercise it, and it is in their power to confer it, they have not thought it essential to the security of life or liberty to establish any such jurisdiction. Let us proceed one step further, and we shall find, in one State at least, that the exercise of this power has been expressly forbidden to the Court of appeals.

By the constitution of Kentucky it is declared, that the Court of appeals (except in cases otherwise directed by this constitution) shall have appellate jurisdiction only, "which shall be co-extensive with the State, under such restrictions

and regulations, not repugnant to the constitution, as may from time to time be prescribed by law." From these expressions it is clear that the Legislature of Kentucky might have vested in that Court a criminal appellate jurisdiction; but so far from doing so, they have declared that altho' a writ of error shall be demandable of right, yet it shall not issue in those cases which may be brought before and determined by the District Court, under the criminal jurisdiction of said Court, in which cases, "no certiorari, appeal, supersedeas, or writ of eror shall be allowed."

From the example, we must believe that many and weighty reasons presented themselves against the establishment of a criminal appeal—and may not many arguments be urged?

When we reflect, also, that our criminal Code is perhaps the mildest in the world, and that our mode of trial gives every chance for innocence to vindicate itself; when from long experience we know that the general leaning of Courts and juries is in favor of the accused and the sacred regard which is always held for the rights secured to them by the constitution—when we reflect with what diffidence and scrupulosity criminal jurisdiction is exercised, and that the District Courts are presided by men of legal learning, and when we further consider the great advantages resulting to the community from the speedy infliction of punishment after the clear conviction

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of guilt—when we reflect on the difficulty of removing prisoners from the remote parts of the State, the danger of escape, and the thousand other embarrassments that present themselves in a croud; we are persuaded that the convention of Louisiana never intended to establish this as a Court of criminal appellate power.

THIS intention we think is clearly collected from the words of the constitution. "The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to civil cases when the matter in dispute shall exceed the value of three hundred dollars."

A general definition of the jurisdiction having been first given in these words—"the Supreme Court shall have appellate jurisdiction only," it may be said that all cases were included. If nothing further than an exclusion of civil cases under three hundred dollars was intended, the plain expression would have been—"which jurisdiction shall not extend to civil cases under three hundred dollars." But as the constitution stands, the first part of the section establishes the *kind* of jurisdiction—it shall be appellate only—the other speaks of its *extent*—it shall extend to all civil cases above the value of three hundred dollars: and the whole is evidently an affirmative description of the kind and extent of the jurisdiction. An affirmative description of the authority granted, must imply an exclusion of any

other authority. The maxim of law, *expressio unius est exclusio alterius*, applies with peculiar propriety to a case of this nature. Affirmative words are often, in their operation, negative of other objects than those affirmed. In the case cited at bar, *United States* vs. *Moore*, 3 *Cranch*, 69, it was contended in support of the jurisdiction of the Court, that, as criminal jurisdiction was exercised by the Courts of the United States, under the description of all cases in law and equity arising under the constitution and laws of the United States, and as the appellate jurisdiction of the Court was extended to all enumerated cases other than those which might be brought in originally, with such exceptions and regulations as Congress shall make, the Supreme Court possessed appellate jurisdiction, in criminal as well as civil cases, over the judgments of every Court, whose decisions it could review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the constitution.

THIS argument, says the Chief Justice, would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. So we say here, the argument of gentlemen would be conclusive, had there been no description of our appellate jurisdiction. But the constitution of Louisiana has done with respect to us, that which the acts of Congress had done with respect to the

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Supreme Court of the U. S., that is, it has given an affirmative description of our powers, and declares they shall extend to civil cases above the value of $ 300. The ground of refusal, stated by the Chief Justice, is that the jurisdiction of the Court has been described and an affirmative description of its powers must be understood as regulated under the constitution prohibiting the exercise of other powers than those described. Where then is the difference between those cases, but that in the one the regulation or description is made by the constitution itself, and in the other, it is by law, under it? Shall a constitutional description of jurisdiction have less efficacy than a legislative one? Shall there be one rule for the construction of a statute and another for the interpretation of a constitutional act?

THIS rule, it is acknowledged, must operate upon a part of this sentence. It is not pretended that the Supreme Court can exercise jurisdiction, as an appellate Court, in civil cases under the value of $ 300. In virtue of what rule is this taken for granted? By the rule, so familiar to every lawyer, that the affirmative declaration of the jurisdiction is an exclusion of any other. But, why shall we stop the operation of the rule here, and not suffer it to have its full force? If we admit its influence upon the amount of jurisdiction, we must admit it also upon its object and extent.

THE Chief Justice of the United States, in the

case of *Moore*, proceeds to observe that the appellate jurisdiction of the Supreme Court from the Circuit Courts is described affirmatively—no restrictive words are used: yet it has never been supposed that a decision of a Circuit Court could be reviewed, unless the matter in dispute should exceed $ 2000. There are no words in the act restraining the Supreme Court under that sum; their jurisdiction is limited by the legislative declaration that they may review the decisions of the Circuit Court, when the value in dispute exceeds the value of $ 2000.

A distinction has been attempted to be drawn between the Courts of the United States, and those of a sovereign State. In the one, it is said nothing can be exercised, but what is expressly given—in the other, every thing is retained and may be exercised in the most unrestrained and unbounded manner. This distinction is correct so for as it respects the several governments—the federal government possesses no power, nor can exercise any other, than that which is expressly granted by the federal constitution; but the moment that grant is made, its right to exercise it is as ample as that of any state in its sovereign capacity, and all the rules, applicable to the several acts regulating it, must be the same in both. There then can be no doubt of the power of the general government to exercise every sort of judicial power, under the constitution and laws of

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the United States, and its authority to distribute it to its different Courts, is as complete as that of any state sovereignty in the union. With these observations we shall dismiss this part of the subject. It is the unanimous opinion of the Court, that it cannot exercise any criminal appellate jurisdiction.

II. THE next question, for the consideration of the Court, is whether a general, superintending jurisdiction is given over the Inferior Courts?

IT is contended in argument that this Court has two characters: 1st that of a Court of appeals, and 2ly of a great superintending tribunal over all Inferior Courts. It is then said that for the purpose of carrying into execution all those powers, the 17th clause of the judicial act has declared "that the Supreme Court shall have power to "make and issue all mandates necessary for the "exercise of its jurisdiction, over the inferior "tribunals, agreeably to the principles and ma-"xims of law."

IN the consideration of this question, we must always keep in view, that the jurisdiction of this Court is appellate only. Chief Justice Marshall (in the case of *Bollman* and *Swartout*) very properly observes that Courts, which originate in the common law, possess a jurisdiction, which must be regulated, by their common law, until some statute shall change the established principles;

but Courts, which are created by written law and whose jurisdiction is defined by written law cannot transcend that jurisdiction. This is not the language of the federal Courts only, the same principles prevail in the Courts of the several States. In the case of *Yates* vs. *the people*, reported in 6th *Johnston*—it is observed by Judge Thompson, that it was warmly pressed upon the Court to construct their powers so as to extend their supervising jurisdiction, but he says he has the fullest confidence that it will not be done so. Chief Justice Kent, speaking of the Court of appeal in New-York, remarks, "this Court is as much bound by law as any Court within the State: the idea that it has an undefined description in any case is wholly unfounded. The members take the same oath as is taken by other judicial officers, they are bound by the most solemn sanctions, legal, moral and religious, to seek after and declare the law. Whether it be defective or unpalatable is not to be made a question here. It is the business of the legislature to make and amend the law, and the duty of every Court to pronounce it, as they find it." The appellate jurisdiction, to be exercised by this Court, must be judicially appellate, that is, it must be the revision and correction of a judicial decision, and, in this State, can only be exercised in cases above the value of three hundred dollars.

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The great and extensive powers possessed by the Court of King's Bench in England, of su-

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perintending the inferior tribunals and of issuing the great prerogative writ of *mandamus*, is the exercise of original jurisdiction and not appellate by writ of error or appeal. Blackstone declares it to be the peculiar duty of the King's Bench to superintend all inferior tribunals, and to inforce the due exercise of the judicial or ministerial powers which the crown or legislature may have invested them with, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice. Does this Court possess any such authority? From whence is it derived? Is this a Court of common law with remnants of regal prerogatives about it? Or is it a Court constituted the other day by a written instrument in which its powers are defined? There is no analogy between our plain appellate Court of limited jurisdiction and the Court of King's Bench in England, with all its splendid attributes of regal sovereignty. That Court had original as well as appellate jurisdiction—it was an emanation from the King's prerogative: it had original jurisdiction in capital offences and misdemeanors of a public nature, tending to a breach of the peace, to oppression, or to any manner of misgovernment. It was the *custos morum* of the nation; it had supreme authority, the King being still presumed by law to sit there, as judge of the Court, tho' he judged by his judges, and the proceedings are supposed to be *coram nobis*, that is before the

King himself, for which all writs in that Court are so made returnable and not *coram justiciariis vestris*.

But, it is asked, what meaning is to be given to the words of the 17th clause "shall have power "to make and issue all mandates necessary for the "exercise of their jurisdiction over the Inferior "Courts?" The answer is a very plain one—by this section, the Court is enabled to inforce its appellate power over the District and City Courts; should they refuse to certify a record, or refuse to obey the sentence or decree of this Court, mandates will be necessary to compel obedience to our judgments.

But is there to be no superintending jurisdiction? Are petty magistrates to be permitted to exercise their village tyranny, unrestrained, and shall there be no power to keep them within bounds? District Courts are established throughout the State; legal characters preside, and it is declared by the 16th section "That the pro-"ceedings of the District Courts in civil and "criminal cases shall be governed by the acts of "the Territorial Legislature, regulating the pro-"ceedings of the late Superior Court, and they "shall have the same powers, when not inconsis-"tent with this act, which were granted to the "said Superior Court by said acts."

The powers of that Court are believed to have been amply sufficient for the purposes proposed,

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and if not, the Legislature can easily confer them, but, were there a defect, it would be no reason for a Court of appellate authority to assume the exercise of original jurisdiction.

MUCH has been said about the supremacy of this Court: it is urged that the word supreme can signify nothing less than that this Court possesses a supreme power over all the others, and an unbounded authority to correct their conduct in every case. The Court, however, do not see in this expression any thing which would warrant the assumption of these extensive powers. This is indeed the *Supreme Court* of the State, but supreme only, in the exercise of the jurisdiction assigned to it by the constitution. In that jurisdiction there is no power above it. It is supreme—wherever that jurisdiction extends, it is supreme, but because this Court is called *supreme*, to pretend that its supremacy must of necessity extend to all cases is certainly an extraordinary idea. According to that mode of reasoning, the power of a Court, once established with the title of Supreme Court, could not be defined or limited: for if limited at all, it would cease to be a Supreme Court, yet no man has ever thought of contesting the right of the people to distribute the powers of government as they please and using that right they have confined the jurisdiction of this Court to certain cases. The highest Court of the U. States is called the *Supreme Court*, yet its powers

are defined and circumscribed and so are those of the Supreme Court of the several States.

To those who with the best intentions have made such animated appeals to the dignity and supremacy of this Court, we will observe, in the words of the Chief Justice of New-York, "that "this Court cannot possibly approve of the sug- "gestions of counsel, to encourage an enlarge- "ment of its authority, to vindicate to itself the "powers that the best Court of errors ought to "have and not to clip the rights of the citizen by "strict rules and technical standards—how can this "Court vindicate or assume to itself powers not "given to it by law?" If such should be our conduct, there would be an end of all law and security within these walls. We should have no certain medium or standard of justice—the citizen would never know when he was safe or what were his rights. This Court would soon become terrible to the suitor and destructive of the established law of the land. In our opinion, no Court should be more scrupulously cautious than this of overleaping its constitutional and legal barriers, because it is a Court of final resort and no other Court can correct its abuses—such an unchecked tribunal would soon become the public terror, or perhaps the public scorn, if it once dreams of discretion or usurpation. Let authority be once assumed under pretence that it is impliedly granted, and liberty must soon make room for arbitrary power.

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UPON the whole, we are of opinion that this is not a case within the appellate jurisdiction of this Court, and the application must therefore be rejected.